UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICHELLE R. CLOWERS, Plaintiff, v. CAROLYN W. COLVIN, Acting Commissioner of Social Security, Defendant.	CASE NO. C13-0539-RSL-MAT REPORT AND RECOMMENDATION RE: SOCIAL SECURITY DISABILITY APPEAL

Plaintiff Michelle R. Clowers proceeds through counsel in her appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's application for Supplemental Security Income (SSI) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, the Court recommends this matter be AFFIRMED.

FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1958.[1] She completed college and has minimal work

1 Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of

history. (*See* AR 69-73.)

Plaintiff filed an application for SSI in March 2010, alleging disability beginning October March 1, 2005. (AR 162-65.) Her application was denied initially and on reconsideration, and she timely requested a hearing.

ALJ Laura Valente held a hearing on August 4, 2011, taking testimony from plaintiff and a vocational expert. (AR 35-81.) On October 19, 2011, the ALJ rendered a decision finding plaintiff not disabled. (AR 14-26.)

Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review on January 25, 2013 (AR 1-3), making the ALJ's decision the final decision of the Commissioner. Plaintiff appealed this final decision of the Commissioner to this Court.

JURISDICTION

The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

DISCUSSION

The Commissioner follows a five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not engaged in substantial gainful activity since March 1, 2010, the application date. At step two, it must be determined whether a claimant suffers from a severe impairment. The ALJ found only plaintiff's posttraumatic stress disorder (PTSD) severe. Step three asks whether a claimant's impairments meet or equal a listed impairment. The ALJ found plaintiff's impairments did not meet or equal the criteria of a listed impairment.

Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

If a claimant's impairments do not meet or equal a listing, the Commissioner must assess residual functional capacity (RFC) and determine at step four whether the claimant has demonstrated an inability to perform past relevant work. The ALJ found plaintiff had the RFC to perform light work, with additional limitations: she can lift twenty pounds occasionally and ten pounds frequently; she has no restrictions in sitting, standing, or walking; she can perform all postural functions on an occasional basis; she can work with written materials so long as the work involves reading up close, while distance reading, such as reading signs, is not possible; and she should not drive or operate machinery such as forklifts. The ALJ also found plaintiff: can understand, remember, and carry out simple, routine tasks and detailed tasks; can work superficially with the general public, i.e., can be in the same room or vicinity as the general public, but cannot respond to their demands or requests other than to refer them to someone else; and can also work superficially with co-workers, allowing her to be in the same room or vicinity, but not able to work in coordination with them. With that RFC, the ALJ found plaintiff unable to perform past relevant work as a social worker.

If a claimant demonstrates an inability to perform past relevant work or has no past relevant work, the burden shifts to the Commissioner to demonstrate at step five that the claimant retains the capacity to make an adjustment to work that exists in significant levels in the national economy. The ALJ concluded plaintiff could perform jobs existing in significant numbers in the national economy, such as work as a stuffer, table worker, and housekeeper. The ALJ, therefore, concluded plaintiff had not been under a disability from March 1, 2010 through the date of the decision.

This Court's review of the final decision is limited to whether the decision is in

accordance with the law and the findings supported by substantial evidence in the record as a whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the final decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

Plaintiff argues the ALJ erred at step two, in assessing her credibility, in rejecting a lay statement, and rejecting the opinions of treating and evaluating providers. She requests remand for further administrative proceedings. The Commissioner argues the ALJ's decision is supported by substantial evidence and should be affirmed.

Step Two

At step two, a claimant must make a threshold showing that her medically determinable impairments significantly limit her ability to perform basic work activities. *See Bowen v. Yuckert*, 482 U.S. 137, 145 (1987) and 20 C.F.R. §§ 404.1520(c), 416.920(c). "Basic work activities" refers to "the abilities and aptitudes necessary to do most jobs." 20 C.F.R. §§ 404.1521(b), 416.921(b). "An impairment or combination of impairments can be found 'not severe' only if the evidence establishes a slight abnormality that has 'no more than a minimal effect on an individual's ability to work.'" *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996 (quoting Social Security Ruling (SSR) 85-28). "[T]he step two inquiry is a de minimis screening device to dispose of groundless claims." *Id*. (citing *Bowen*, 482 U.S. at 153-54). An ALJ is also required to consider the "combined effect" of an individual's impairments in

considering severity. *Id*. A diagnosis alone is not sufficient to establish a severe impairment. Instead, a claimant must show that her medically determinable impairments are severe. 20 C.F.R. §§ 404.1520(c), 416.920(c).

A. Personality Disorder

Plaintiff first argues step two error in relation to a personality disorder. The ALJ discussed plaintiff's alleged history of bipolar disorder and concluded it was not established for the time period after the protective filing date, but did not address a personality disorder at step two. (AR 17.) Plaintiff points to support for the existence of a severe personality disorder in medical opinions and in various reports as to her difficulty with anger. (Dkt. 12 at 4.) She contends that, with proper determination of her impairments, the ALJ would likely have reached a different credibility determination through consideration of her anger symptoms as related to either personality disorder or pain and fatigue symptoms of fibromyalgia.

A step two severe impairment must result from anatomical, physiological, or psychological abnormalities which can be shown by medically acceptable clinical and laboratory diagnostic techniques, and established by medical evidence consisting of signs, symptoms, and laboratory findings, not only by the claimant's statement of symptoms. 20 C.F.R. §§ 404.1508, 416.908. This requirement presupposes the existence of an actual diagnosis. *See Ukolov v. Barnhart*, 420 F.3d 1002, 1005-06 (9th Cir. 2005) (noting SSR 96-6p "provides that a medical opinion offered in support of an impairment must include 'symptoms [and a] *diagnosis*.'") (emphasis in original).

Plaintiff's argument unsuccessfully relies on evidence from examining physician Dr. Linda Ford, reviewing State Agency consultant Dr. Thomas Clifford, and mental health

practitioner Catherine Naiad, as none of these individuals diagnosed plaintiff with a personality disorder. Drs. Ford and Clifford included diagnoses of "[rule out] Cluster B Traits" (AR 488, 502), while Naiad stated "hints of personality disorder" was an "area need[ing] further assessment." (AR 676.) These possible diagnoses do not demonstrate a severe impairment. *Carrasco v. Astrue*, No. ED CV 10-0043 JCG, 2011 U.S. Dist. LEXIS 12637 at*12-13 (C.D. Cal. Feb. 8, 2011) ("A 'rule-out' diagnosis is by no means a diagnosis. In the medical context, a 'rule-out' diagnosis means there is evidence that the criteria for a diagnosis may be met, but more information is needed in order to rule it out.") (cited cases omitted).

The record does contain December 2009 and December 2010 diagnoses of borderline personality disorder from examining physician Dr. Geordie Knapp. (AR 608, 615.) However, the ALJ recognized those diagnoses and rejected the opinions of Dr. Knapp at step four. Of particular import to the step two argument, the reasons given for the rejection of Dr. Knapp's opinions included that they appeared to be based on plaintiff's subjective reports, rather than objective examination findings, and were inconsistent with the results of mini-mental status examinations conducted, "which were 29/30 in December 2009 and 30/30 in December 2010." (AR 24.) As discussed further below, the ALJ properly rejected the opinion evidence from Dr. Knapp based on these and other reasons. *See, e.g., Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) (an ALJ may reject a physician's opinion "if it is based 'to a large extent' on a claimant's self-reports that have been properly discounted as incredible."); *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005) (rejecting physician's opinion due to discrepancy or contradiction between opinion and the physician's own notes or observations is "a permissible determination within the ALJ's province."). Further, as the

Commissioner argues, the diagnoses from Dr. Geordie lacked the support of clinical findings, and were, therefore, insufficient to support the existence of a severe impairment. 20 C.F.R. § 404.1528(a) (symptoms alone not enough to establish impairment) and (b) ("Signs" are "anatomical, physiological, or psychological abnormalities which can be observed, apart from the claimant's statements (symptoms)[,]" and "must be shown by medically acceptable clinical diagnostic techniques."); *Ukolov*, 420 F.3d at 1005 (a medically determinable impairment must be established by medical evidence consisting of signs, symptoms, and laboratory findings, and "'under no circumstances" may an impairment be established based on symptoms alone) (quoting SSR 96-4p).

Nor does plaintiff otherwise demonstrate reversible error. An ALJ's error may be deemed harmless where it is "'inconsequential to the ultimate nondisability determination.'" *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012) (cited sources omitted). The Court looks to "the record as a whole to determine whether the error alters the outcome of the case." *Id.*

Plaintiff points to her "difficulty with anger" and contends the credibility assessment would have been different upon a step two consideration of personality disorder. However, the ALJ in this case found plaintiff's PTSD severe, provided a step two analysis of bipolar disorder supported by substantial evidence, adequately addressed the diagnoses of personality disorder given by Dr. Geordie at step four, and, as discussed below, provided numerous clear and convincing reasons for finding plaintiff less than fully credible. The ALJ also accounted for plaintiff's anger symptoms by assessing social limitations in the RFC. *See Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007) (failure to list an impairment as severe at step two may be

deemed harmless where the ALJ considers associated limitations at step four); *Burch v. Barnhart*, 400 F.3d 676, 682 (9th Cir. 2005) (even assuming omission of consideration of condition at step two constituted error, "it could only have prejudiced" the claimant at steps three or five "because the other steps, including [step two], were resolved in her favor.") Therefore, assuming error in the failure to address personality disorder at step two, that error can be deemed harmless.

B. Fibromyalgia

The ALJ did consider fibromyalgia at step two:

> The claimant contends that fibromyalgia causes functional limitations. She testified that she has constant pain, and stated that her left leg has buckled. In March 2010 rheumatologist Andrew Sohn, M.D., examined the claimant and concluded that he agreed with a diagnosis of fibromyalgia, but noted that it was a "diagnosis of exclusion." Dr. Sohn noted the presence of diffuse muscoskeletal tenderness, but did not identify the specific tender points required for diagnosis of fibromyalgia by the American College of Rheumatology ([AR 278-80]). In addition, the identification of these tender points is not found anywhere in the medical record, and the diagnoses of fibromyalgia appear based on the claimant's reports. Treatment records from March 2010 show that the claimant was not reporting any fibromyalgia symptoms at that time ([AR 297, 303]). Therefore, the undersigned finds that this impairment is not established by the medical evidence.

(AR 17.) As with personality disorder, plaintiff fails to support reversible error.

SSR 12-2p sets forth the criteria for establishing whether a claimant has a medically determinable impairment (MDI) of fibromyalgia (FM).[2] Beyond a diagnosis from a physician, a claimant must provide evidence satisfying one of two different sets of criteria – based on 1990 and 2010 criteria from the American College of Rheumatology (ACR) respectively – and the

2 The ALJ rendered her decision on October 19, 2011 and was not bound by SSR 12-2p, which went into effect July 25, 2012. *See Paulson v. Bowen*, 836 F.2d 1249, 1252 n.2 (9th Cir. 1988) ("*Once published*, a ruling is binding upon ALJs and is to be relied upon as precedent in determining cases where the facts are basically the same.") (emphasis added). However, because the ruling pre-dated the Appeals Council's decision, it is considered herein.

diagnosis must not be "inconsistent with other evidence in the person's case record." *Id*.

To satisfy the first set of criteria, a claimant must have: (1) a history of widespread pain; that is, pain in all quadrants of the body (right and left sides, above and below waist) and axial skeletal pain (cervical spine, anterior chest, thoracic spine, or low back) that has persisted for at least 3 months; (2) at least eleven positive tender points on physical examination found bilaterally and above and below waist; and (3) evidence other disorders that could cause the symptoms or signs were excluded. *Id*. The eighteen tender points used in a FM diagnosis are located on both sides of the body and include: occiput (base of skull); lower cervical spine (back and side of neck); trapezius muscle (shoulder); supraspinatus muscle (near shoulder blade); second rib (top of rib cage near sternum or breast bone); lateral epicondyle (outer aspect of elbow); gluteal (top of buttock); greater trochanter (below hip); and inner aspect of knee. SSR 12-2p. To satisfy the second set of criteria, a claimant must have: (1) history of widespread pain (as above); (2) repeated manifestations of six or more FM symptoms, signs, or co-occurring conditions, especially fatigue, cognitive or memory problems, waking unrefreshed, depression, anxiety disorder, or irritable bowel syndrome; and (3) evidence other disorders that could cause those manifestations were excluded. *Id*.

Plaintiff contends the evidence from Dr. Sohn meets the diagnostic criteria required for a FM diagnosis:

> There is no evidence of synovitis in terms of joint swelling, warmth or redness throughout. Right hand has mild tenderness along the PIPs, without swelling. Remainder of bilateral hands and wrists reveal no synovitis or tenderness. The forearms and elbow are generally tender without synovitis. Upper arms are generally tender. Shoulders have full range of motion. Neck range of motion appears unremarkable. There is tenderness of the neck, upper mid to the low back and palpation was done with minimum amount of pressure and she was tender. The back forward flexion appears somewhat limited but extension is

> fine. She has tenderness along the sides of the hips and thighs. The knees are tender diffusely, including the medial aspects as well as anteriorly. The calves are tender.

(AR 280.) However, Dr. Sohn did not clearly identify tenderness in eleven out of eighteen tender points. Instead, while clearly finding tenderness on plaintiff's elbows and knees, he otherwise found: tenderness on plaintiff's "[u]pper arms," with no indication of a finding at the supraspinatus muscle (near the shoulder blade); tenderness "along the sides of the hips," with no indication of a finding at the greater trochanter (below the hip); and tenderness of the neck, with no indication as to findings at both the back and sides of the neck. Because the ALJ's interpretation of the evidence from Dr. Sohn can be deemed rational, it should not be overturned. *Morgan v. Commissioner of the SSA*, 169 F.3d 595, 599 (9th Cir. 1999) ("Where the evidence is susceptible to more than one rational interpretation, it is the ALJ's conclusion that must be upheld.") (citing *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995)).

Plaintiff argues that, if she felt the evidence from Dr. Sohn was ambiguous or inadequate, the ALJ had a duty to develop the record and conduct an appropriate inquiry. *See* 20 C.F.R. §§ 404.1512(e), 416.912(e) (ALJ obligated to recontact a treating physician or psychologist when the evidence received is inadequate for a determination of disability) and *Mayes v. Massanari*, 276 F.3d 453, 459-60 (9th Cir. 2001) ("ALJ's duty to develop the record further is triggered only when there is ambiguous evidence or when the record is inadequate to allow for proper evaluation of the evidence."); *accord Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001). She also notes the recognition in SSR 12-2p that a consultative examination may be purchased where there is insufficient evidence to determine a MDI of FM.

The ALJ did not rely solely on Dr. Sohn's failure to identify the necessary tender points.

She also noted Dr. Sohn's observation that he gave a "diagnosis of exclusion[,]" that the record did not otherwise reveal identification of tender points, that the diagnoses of FM "appear based on the claimant's report[,]" and that March 2010 treatment records show plaintiff "was not reporting any fibromyalgia symptoms at that time ([AR 297, 303]). (AR 17.) One of the records cited by the ALJ does include a notation reflecting plaintiff's report of FM symptoms. (AR 303 ("Having pain in Fibromyalgia and TMJ.")) However, even recognizing this fact and further assuming the failure to identify FM as a severe condition and/or to further develop the record constituted error, such error can be deemed harmless. *See Molina*, 674 F.3d at 1115.

While not finding plaintiff's FM severe at step two, the ALJ proceeded to consider the condition in the remainder of the sequential evaluation. The ALJ later considered Dr. Sohn's opinions at step four, affording "little weight" to the FM diagnosis: "As he noted, this is a diagnosis of exclusion. Furthermore, his analysis does not include identification of the specific tender points required for fibromyalgia diagnosis." (AR 23.) As discussed further below, the ALJ also gave no weight to the opinion of Dr. Mark Jabbusch (spelled Jubhers in the ALJ's decision), who assessed significant functional limitations due to FM, finding it not consistent with the evidence and plaintiff's proven capabilities, and noting the absence of any evidentiary basis for the analysis. (AR 23 (discussing AR 632-36).) However, the ALJ gave substantial weight to the opinion of reviewing physician Dr. Dennis Koukol, who affirmed the diagnosis of FM and found plaintiff limited to light work. (AR 20, 22, 477-84, 601.) The ALJ concluded that, while the objective evidence did not establish the severity of the impairment, the record did "support the finding that the claimant's impairments limit her to

light work." (AR 22; *see also* AR 20.)[3]

As the Commissioner observes, plaintiff fails to identify functional limitations caused by FM that the ALJ failed to include in the RFC. In addition, while the ALJ limited plaintiff to light work, she also identified sedentary positions plaintiff could perform at step five. (AR 25.) As with the light work assessment, plaintiff does not identify or provide sufficient support for functional limitations associated with her FM precluding her performance of such positions.

Plaintiff also argues the Appeals Council erred by failing to evaluate her FM based on the 2010 ACR criteria set forth in SSR 12-2p. However, plaintiff does not set forth evidence supporting a diagnosis under that criteria. In particular, while maintaining the record reveals repeated manifestation of six or more FM symptoms, signs, or co-occurring conditions, plaintiff identifies only four such factors, namely, fatigue, headaches, depression, and temporomandibular joint disorder. (*See* Dkt. 12 at 7-8.) Moreover, and again, it remains that the ALJ did consider and account for plaintiff's FM in the subsequent steps of the sequential evaluation. For this reason, and for the reasons discussed above, plaintiff fails to demonstrate reversible error in relation to FM.

Credibility

Absent evidence of malingering, an ALJ must provide clear and convincing reasons to reject a claimant's testimony. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007) (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 344 (9th Cir. 1991)). *See also Vertigan v. Halter*,

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3 Plaintiff's contention that this was error in that it relied on her self-report of symptoms is not well taken. (Dkt. 12 at 6, n.2.) The ALJ must consider the limiting effects of all of plaintiff's impairments, including those not severe, in determining RFC. §§ 404.1545(e), 416.945(e); SSR 96-8p. Further, where the ALJ "is unable to determine clearly the effect of an impairment(s) on the individual's ability to do basic work activities," she "must continue to follow the sequential evaluation process until a determination or decision about disability can be reached." SSR 96-3p; *accord* SSR 85-28.

260 F.3d 1044, 1049 (9th Cir. 2001). "General findings are insufficient; rather, the ALJ must identify what testimony is not credible and what evidence undermines the claimant's complaints." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996). "In weighing a claimant's credibility, the ALJ may consider his reputation for truthfulness, inconsistencies either in his testimony or between his testimony and his conduct, his daily activities, his work record, and testimony from physicians and third parties concerning the nature, severity, and effect of the symptoms of which he complains." *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

The ALJ in this case found plaintiff's impairments could be reasonably expected to cause some of the alleged symptoms, but that her statements concerning the intensity, persistence, and limiting effects of those symptoms were not credible to the extent inconsistent with the assessed RFC. As set forth below, the ALJ provided a number of clear and convincing reasons for her determination.

A. Lack of Treatment

The ALJ observed a "lengthy gap" in the evidence, "with no record available from December 2005 to January 2009." (AR 20.) She noted this period included a time during which plaintiff alleged she was hospitalized after attempting suicide. (*Id*. (citing AR 614).) The ALJ found the gap to suggest plaintiff's symptoms "were not severe during that time period." (*Id*.)

As plaintiff concedes, an ALJ appropriately considers an unexplained or inadequately explained failure to seek treatment in assessing credibility, *Tommasetti*, 533 F.3d at 1039, and the claimant bears the burden of producing evidence to support her disability, *see generally*

Meanel v. Apfel, 172 F.3d 1111, 1113 (9th Cir. 1999). However, plaintiff argues that, before finding her not credible for lack of treatment, the ALJ was obligated to determine if records were available. *See Tonapetyan*, 242 F.3d at 1150. Yet, plaintiff does not support the existence of an ambiguity or finding of inadequacy triggering the ALJ's duty to further develop the record. *Id*.; *accord Mayes*, 276 F.3d at 459-60. As the Commissioner observes, the ALJ asked and was informed by plaintiff's counsel that the medical evidence presented at hearing "comprise[d] the entire record." (AR 39.) Plaintiff, therefore, fails to demonstrate error in the ALJ's consideration of the gap in the record.

B. Activities of Daily Living

The ALJ found plaintiff's allegations of physical disability undermined by her activity level, including evidence of regular exercise, the ability to perform household chores, such as laundry and cooking, and a reference in the record to her retrieving a cat from a tree. (AR 20.) She found these activities "not consistent with the presence of disabling pain," and supporting a finding plaintiff could work at the light exertion level. (*Id*.)

The ALJ similarly determined plaintiff's activities of daily living and demonstrated functional ability indicated her mental symptoms were not as limiting as alleged. (AR 21.) She pointed to plaintiff's testimony and other evidence in the record showing her ability to care for herself and her cat, to perform basic cleaning tasks, that she does the majority of cooking, "quilts, sews, crotchets, and does cross-stitch[,]" and "is able to read and understand novels without difficulty." (*Id*.) The ALJ found this evidence to show plaintiff "is able to concentrate and persist on tasks, consistent with an ability to work." (*Id*.) The ALJ also found evidence plaintiff had friends when living in Oklahoma, and her testimony of "no

problems interacting with people now" and that she currently has a friend with whom she goes grocery shopping, as demonstrating her "ability to function socially at least at the level indicated" in the assessed RFC. (*Id.*)

Plaintiff takes issue with the activities identified by the ALJ, arguing, for example, that neither a one-time activity of rescuing a cat which resulted in an injury (AR 62, 593), nor that she cross-stitches for an hour at a time "once in a great while[]" (AR 51), serve as clear and convincing reasons to find her less than fully credible, nor suffices to demonstrate she can sustain a full time job. She notes the Ninth Circuit's recognition that "the mere fact that a plaintiff has carried on certain daily activities, such as grocery shopping, driving a car, or limited walking for exercise, does not in any way detract from her credibility as to her overall disability. One does not need to be 'utterly incapacitated' in order to be disabled." *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001) (quoting *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989).)

However, as also found by the Ninth Circuit:

> While a claimant need not '"vegetate in a dark room"' in order to be eligible for benefits, the ALJ may discredit a claimant's testimony when the claimant reports participation in everyday activities indicating capacities that are transferable to a work setting. Even where those activities suggest some difficulty functioning, they may be grounds for discrediting the claimant's testimony to the extent that they contradict claims of a totally debilitating impairment.

Molina, 674 F.3d at 1112-13 (citations omitted). The ALJ here properly took note of inconsistencies between plaintiff's assertions as to the degree of her limitations and evidence in the record. *See Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007) (noting "two grounds for using daily activities to form the basis of an adverse credibility determination[,]" including (1)

whether the activities contradict the claimant's testimony and (2) whether the activities "meet the threshold for transferable work skills[.]") (citing *Fair*, 885 F.2d at 603). The ALJ, for example, reasonably considered evidence plaintiff exercised regularly (AR 546), given her assertion she is "in constant pain all the time[]" (AR 43), and her testimony she could read and understand entire novels and had no problems getting along with others (AR 50-51, 63), given assertions of marked impairments in concentration, persistence, and pace and in social functioning (AR 41). Plaintiff fails to demonstrate any error in the ALJ's consideration of her daily activities as undermining her credibility.

C. Lack of Objective Evidence and Contradictory Evidence

Plaintiff avers that, given the invalidity of the other reasons proffered, the ALJ's reliance on a lack of supportive objective evidence cannot serve as a clear and convincing reason to find her not credible. *Berry v. Astrue*, 622 F.3d 1228, 1234 (9th Cir. 2010) ("'Once the claimant produces medical evidence of an underlying impairment, the Commissioner may not discredit the claimant's testimony as to subjective symptoms merely because they are unsupported by objective evidence.'") (quoting *Lester*, 81 F.3d at 834). However, as discussed above and below, plaintiff fails to demonstrate reversible error in the ALJ's credibility reasoning. There would, consequently, be no error in a reliance on a lack of supporting objective evidence. *See Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001) ("While subjective pain testimony cannot be rejected on the sole ground that it is not fully corroborated by objective medical evidence, the medical evidence is still a relevant factor in determining the severity of the claimant's pain and its disabling effects."); *accord* SSR 96-7p.

In any event, the ALJ did not find plaintiff less than fully credible based on a lack of

objective support. She, instead, properly pointed to and relied on the existence of contradictory medical evidence in the record. *Carmickle v. Comm'r of SSA*, 533 F.3d 1155, 1161 (9th Cir. 2008) ("Contradiction with the medical record is a sufficient basis for rejecting the claimant's subjective testimony.") (citing *Johnson v. Shalala*, 60 F.3d 1428, 1434 (9th Cir. 1995)). The evidence relied upon included assessments from Drs. Clifford and Ford, and treatment records from Therapy Consultants. (AR 20-21.)

Plaintiff argues the ALJ did not identify and discuss other evidence in the record favorable to her claim, such as lower Global Assessment of Functioning (GAF) scores and observations in the treatment notes. However, the ALJ, as described below, properly supported her assessment of the medical opinion evidence, including the lower GAF scores. She further explained her reliance on contradictory evidence in the record by noting that "*[o]verall*, the treatment records support Dr. Ford's and Dr. Clifford's opinions." (AR 21 (emphasis added).) Contrary to plaintiff's contention the ALJ's decision reflects neither selective consideration of the record, not reliance on a slim quantum of evidence. *See Lingenfelter*, 504 F.3d at 1035 (ALJ must consider "entire record as a whole, 'weighing both the evidence that supports and the evidence that detracts from the Commissioner's conclusion,' and 'may not affirm simply by isolating a specific quantum of supporting evidence.'") (quoted sources omitted). Instead, the ALJ's decision shows consideration of the record as a whole, and the existence of substantial evidence support for the conclusions reached.

D. Drug-Seeking Behavior

The ALJ found evidence of drug-seeking behavior to diminish plaintiff's credibility. (AR 21.) Plaintiff maintains the ALJ inaccurately describes one of the records as reflecting the

prescription of Valium "despite no clinical findings" (AR 21), noting she was, in fact, diagnosed with "fatigue due to sleep deprivation[]" (AR 246), and had reported to her providers that Valium helped her sleep (AR 265). Yet, the ALJ acknowledged plaintiff requested the valium to help her sleep (AR 21), and plaintiff does not identify any clinical findings in the record at issue, only her report of fatigue.

Plaintiff also points to her testimony she went to the emergency room to get pain medication because she lacked medical insurance as explaining these incidents (AR 56-57), and describes the reasoning of the ALJ, and observations in the records, as no more than suspicions. However, the ALJ persuasively identified a number of incidents in which plaintiff received narcotic pain medication in the absence of objective clinical findings (*see*, *e.g.*, AR 260-61), incidents in which medical providers suspected or noted suspected drug-seeking behavior (AR 644, 654), and an incident in which plaintiff was observed to have displayed behavior inconsistent with her pain complaints (AR 637). While plaintiff takes a different view of the evidence, the ALJ's consideration of evidence reflecting drug-seeking behavior was rational and appropriate. *Massey v. Comm'r SSA*, No. 10-35004, 2010 U.S. App. LEXIS 21508 at * 2 (9th Cir. Oct. 19, 2010) (ALJ's interpretation of record that claimant engaged in drug-seeking behavior is a clear and convincing reason for disregarding his testimony); *Edlund v. Massanari*, 253 F.3d 1152, 1157 (9th Cir. 2001), *amended opinion* at 2001 U.S. App. LEXIS 17960 (Aug. 9, 2001) (ALJ properly considered evidence of exaggeration of pain to receive pain medication in credibility assessment).

E. Inconsistent Statements and Activities

The ALJ first noted plaintiff's testimony at hearing that she ran out of bipolar

medications because she could not afford them and did not try to obtain samples because she was not aware she could do so, while shortly thereafter testifying she received free samples of Ambien from her doctor. (AR 22, 56-60.) Plaintiff persuasively argues that her testimony as a whole can be read as reflecting her belief she was unaware she could obtain samples of bipolar medications from someone other than a treating physician or care provider. (*See* AR 54-57 and AR 80 ("Q. . . . So you went to the emergency room for pain medications, but you didn't go for bipolar medication? Is there a reason that you went for one and not the other? A. I figured they wouldn't do anything about my bipolar, that I'd have to actually see somebody to get it.")) However, any error in the consideration of this evidence can be deemed harmless given the other reasons proffered by the ALJ. *See Carmickle*, 533 F.3d at 1162-63.

An ALJ may consider "ordinary techniques of credibility evaluation, such as the claimant's reputation for lying, prior inconsistent statements concerning the symptoms, and other testimony by the claimant that appears less than candid[.]" *Smolen*, 80 F.3d at 1284. An ALJ also appropriately considers inconsistencies or contradictions between a claimant's statements and her activities. *Tonapetyan*, 242 F.3d at 1148; *Thomas*, 278 F.3d at 958-59. The ALJ here considered various factors, inconsistencies, and contradictions in the record and in plaintiff's testimony as undermining her credibility, and as showing her allegations of disabling symptoms were "not congruent with what she describes as her typical activities and behavior." (AR 22.)

The ALJ observed that, "[p]ardoxically," plaintiff testified "she does not like taking narcotic medication, despite her history of using prescription medications." (AR 22, 51-52.) Plaintiff avers the record as a whole makes clear she "did have a fear of addictive substances

and minimized use as much as possible." (Dkt. 12 at 13.) However, plaintiff fails to cite any such records in support. (*Id*. (citing AR 52-54 (plaintiff's testimony).)

The ALJ noted plaintiff's testimony she is allergic to Vicodin, despite medical records showing prescriptions of that medication. (AR 22, 51-53, 251, 261.) Plaintiff's various arguments challenging this finding lack merit. For instance, plaintiff's contention she "could have misunderstood the judge[]" is plainly contradicted by the record. (AR 53 ("Q. Okay, and then you were also taking Vicodin. A. I'm allergic to Vicodin, so that might be a mistype. Q. Well, I don't think it's a mistype, I mean, . . . They prescribed Vicodin. This was back in '05. A. No. Q. For back pain? A. I can't take Vicodin at all."))

The ALJ contrasted plaintiff's assertion she isolates in bed for extended periods, hiding under her pillow and covers, with her testimony she sees and shops with a friend on a regular basis, her report of "no problems interacting with others," and with her ability to go to appointments, grocery shopping, and the library. (AR 22.) The ALJ also contrasted plaintiff's allegation of severe problems with sleep, insomnia, and nightmares, with the fact that "she reads horror novels, [paranormal stories,] romance novels, true ghost stories, novels about vampires and mystery novels – and spends time watching violent movies." (*Id*. (citing AR 615, [485-88]).) She reasoned: "It is difficult to believe [plaintiff's] report of disabling nightmares, fear of the dark, and other sleep disturbance when she is able to read and view this kind of content." (*Id*.) While plaintiff takes a different view of this evidence, she fails to demonstrate the ALJ's consideration of the evidence and resulting conclusion was not rational. "One strong indication of the credibility of an individual's statements is their consistency, both internally and with other information in the case record." SSR 96-7p. The consideration of this

evidence, as well as the other factors, inconsistencies, and contradictions noted by the ALJ, serves as additional clear and convincing reasons for the ALJ's credibility determination.

F. Work History

The ALJ also addressed an issue regarding plaintiff's work history:

> Regarding her work history, the claimant strongly denied ever working as a social worker for Child Protective Services (CPS), despite multiple contrary reports in the record ([AR 279, 486]). Her credibility is further undermined by her testimony that she worked under the table in the past. In addition, the claimant admitted to a history of shoplifting, a crime that weakens her veracity. Given this history, the claimant's testimony regarding her work history is suspect.

(AR 22.) Plaintiff fails to undermine the ALJ's consideration of this evidence.

The record reflects plaintiff reported to two different evaluating physicians, Drs. Sohn and Ford, that she previously worked for CPS. (AR 279, 486.) Any attempt on plaintiff's part to imply Dr. Ford obtained this information from reviewing Dr. Sohn's prior evaluation (*see* Dkt. 12 at 14) should be rejected given the inclusion of far greater detail in Dr. Ford's report. (AR 279 (March 2010 report from Dr. Sohn: "She used to work in [CPS] but is presently not working.") and AR 486 (May 2010 report from Dr. Ford: "Claimant states she worked for two years in California for CPS, working with developmentally delayed children. She states that she quit in 1990 because she got married and hated the job.")) These reports, rather than demonstrating a reliance on only a slim quantum of evidence and "[s]heer disbelief" (Dkt. 12 at 14), provide substantial evidence support for the ALJ's conclusion. The Court further notes that plaintiff does not address the ALJ's observations as to working under the table or shoplifting.

Plaintiff, in sum, fails to demonstrate error in the ALJ's consideration of this evidence

as an additional basis for finding her less than fully credible. The ALJ's credibility finding should be upheld.[4]

Lay Witness Evidence

Lay witness testimony as to a claimant's symptoms or how an impairment affects ability to work is competent evidence and cannot be disregarded without comment. *Van Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996). The ALJ can reject the testimony of lay witnesses only upon giving germane reasons. *Smolen*, 80 F.3d at 1288-89.

The ALJ considered a lay statement provided by plaintiff's mother, Kathy Walters, noting her report plaintiff "is able to run errands, perform household chores, and engage in her hobbies[,]" but "has problems standing, walking, and completing tasks." (AR 24 (discussing AR 193-200).) She found: "Overall, Ms. Walters' statements do not establish the presence of any disabling impairment. Her comments are given little weight, as her statements regarding the claimant's limitations are not consistent with the claimant's demonstrated abilities and the medical evidence of record." (*Id*.)

Both inconsistency between a lay statement and evidence of a claimant's activities, and inconsistency between a lay statement and the medical record constitute specific and germane reasons for discrediting lay testimony. *See Carmickle*, 533 F.3d at 1164 (activities), and *Bayliss*, 427 F.3d at 1218 (medical evidence). Also, to the extent plaintiff alleges the ALJ was required to address each and every statement offered by the lay witness, this argument should be rejected. Indeed, the failure to address lay testimony in its entirety may be deemed

4 As plaintiff observes, any error in the consideration of the social worker job as past relevant work at step four, such as its performance more than fifteen years prior to the ALJ's decision, is harmless. The ALJ determined plaintiff could not perform the job and proceeded to step five.

harmless where it is "'inconsequential to the ultimate nondisability determination.'" *Molina*, 674 F.3d at 1115 (cited sources omitted). "Where lay witness testimony does not describe any limitations not already described by the claimant, and the ALJ's well-supported reasons for rejecting the claimant's testimony apply equally well to the lay witness testimony," the failure to address the lay testimony may be deemed harmless. *Id*. at 1117-22. In this case, the ALJ's reasoning provided in relation to plaintiff's testimony applies equally well to the testimony offered by Ms. Walters.

In addition, as the Commissioner observes, the ALJ accounted for a number of limitations attested to by Ms. Walters in the RFC, including limitations to light work, with only superficial interactions with coworkers and the public. The ALJ further identified both light and sedentary jobs plaintiff could perform at step five. Plaintiff, for all of these reasons, fails to demonstrate error in the consideration of the lay testimony.

Medical Opinion Evidence

Plaintiff argues error in the failure to include all limitations supported by substantial evidence in the RFC. She points to improperly excluded limitations assessed by Dr. Jabbusch, Dr. Allison Shigaki, and Dr. Knapp, and argues error in the reliance on the opinions of Dr. Ford.

In general, more weight should be given to the opinion of a treating physician than to a non-treating physician, and more weight to the opinion of an examining physician than to a non-examining physician. *Lester*, 81 F.3d at 830. Where not contradicted by another physician, a treating or examining physician's opinion may be rejected only for "'clear and convincing'" reasons. *Id*. (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991)). Where contradicted, a treating or examining physician's opinion may not be rejected without

"'specific and legitimate reasons' supported by substantial evidence in the record for so doing." *Id*. at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)).

The RFC encompasses the most a claimant can do considering his or her limitations or restrictions. *See* SSR 96-8p. The ALJ must consider the limiting effects of all of plaintiff's impairments, including those that are not severe, in determining her RFC. 20 C.F.R. §§ 404.1545(e), 416.945(e); SSR 96-8p. However, an RFC assessment need not account for limitations or impairments the ALJ properly rejected. *See Bayliss*, 427 F.3d at 1217-18.

A. Dr. Mark Jabbusch

Dr. Jabbusch completed a "Fibromyalgia [RFC] Questionnaire" on May 31, 2011, assessing a variety of limitations. (AR 632-36.) He opined plaintiff would miss more than four days per month and is incapable of even low stress jobs. (AR 633, 635.) The ALJ gave no weight to this opinion, finding it not consistent with the medical evidence and plaintiff's proven capabilities, and noting the absence of any evidentiary basis for the analysis. (AR 23.) Because the record contained contradictory opinions as to plaintiff's physical limitations from reviewing physicians (*see* AR 20, 22, 484, 601), the ALJ was required to provide specific and legitimate reasons for rejecting the opinions of Dr. Jabbusch.

Plaintiff points to the observation on the questionnaire that the opinion was provided based on "one month" of treatment. (AR 632.) Yet, as the Commissioner observes, the record does not contain any treatment notes or clinical test results revealing either the nature of this physician's working relationship with plaintiff or providing support for the opinions. "The ALJ need not accept the opinion of any physician, including a treating physician, if that opinion is brief, conclusory, and inadequately supported by clinical findings." *Thomas*, 278

F.3d at 957. *See also Batson v. Commissioner*, 359 F.3d 1190, 1195 (9th Cir. 2004) (a treating physician's opinions may be discounted when it is "in the form of a checklist, did not have supportive objective evidence, was contradicted by other statements and assessments of [the claimant's condition], and was based on [the claimant's] subjective descriptions of pain.") The ALJ, as such, properly pointed to the absence of any evidentiary basis for the opinions.

An ALJ may further properly reject a physician's opinion as inconsistent with the medical record, *Tommasetti*, 533 F.3d at 1041, and with a claimant's level of activity, *Rollins*, 261 F.3d at 856. In this case, as discussed above, the ALJ pointed to contradictory medical evidence in the record and other evidence reflecting a greater level of activity and ability than that alleged by plaintiff. The ALJ, therefore, proffered additional specific and legitimate reasons for rejecting the opinions of Dr. Jabbusch by deeming this opinion evidence not consistent with the medical record and plaintiff's proven capabilities.

B. Dr. Allison Shigaki

The record also contains a form completed by Dr. Shigaki on June 30, 2011 and identifying a variety of limitations. (AR 638-41 (copies of same form, one with handwritten name below signature).) The ALJ gave little weight to the opinions of Dr. Shigaki:

> Dr. Shigaki concluded that the claimant would miss about four days per month, is unable to maintain attention for two hours [at] a time, and has serious limitations in many other areas of functioning. While Dr. Shigaki has treated the claimant, it is noted that this treatment started one month prior to her June 2011 assessment. These findings are not consistent with the findings of Dr. Ford and are not consistent with the claimant's reports of her daily activities. These show that she is able to concentrate on many tasks, such as reading, watching movies and various hobbies. She is also able to go out in public for errands and shopping [and] to visit the library. The evidence shows that the claimant is more capable than found by Dr. Shigaki.

(AR 23.)

Plaintiff argues that ALJ improperly relied on the opinions of Dr. Ford. The ALJ gave the "most weight" to the opinions of Dr. Ford, finding her statement that plaintiff "'is likely to maintain regular attendance and work consistently'" was supported by her comprehensive mental health evaluation and consistent with the medical evidence of record. (AR 22.) Plaintiff notes that the quoted portion of Dr. Ford's opinion was accompanied by the following:

> In terms of performing work activities consistently and maintaining regular attendance, this is more difficult to answer. As she describes her symptoms, she is likely to be able to maintain regular attendance and work consistently; however, her lack of increasing the scope of her activities since November is concerning for the possibility of a higher level of anxiety in crowds and in new situations than she acknowledges.

(AR 489.) Plaintiff, however, fails to acknowledge Dr. Ford's next statement: "That said, consistent, structured, productive activity is likely to assist her in maintaining her sense of self as well as mood, especially if the claimant receives appropriate medication and therapeutic interventions for her PTSD symptomatology." (*Id*.)

Plaintiff also fails to acknowledge that the ALJ assessed limitations in plaintiff's ability to interact with the public and coworkers consistent with Dr. Ford's observations as to anxiety in crowds and new situations. (AR 19.) While plaintiff points to her reports as to her limitations, the observations of her mother, and various other references in the record, she fails to demonstrate the ALJ erred in addressing that evidence. Plaintiff also notes that Dr. Ford's opinion did not stem from treatment and describes it as based on a "very short clinical interview without administration of any tests." (Dkt. 12 at 20.) However, as the ALJ observed, Dr. Shigaki had treated plaintiff for only one month prior to the completion of the evaluation.

Furthermore, the evaluation provided by Dr. Ford is, particularly as compared to the form completed by Dr. Shigaki, appropriately described as reflecting a comprehensive mental health evaluation. (*Compare* AR 485-89, *with* AR 640-41.)

"The ALJ is responsible for resolving conflicts in the medical record." *Carmickle*, 533 F.3d at 1164. When evidence reasonably supports either confirming or reversing the ALJ's decision, the Court may not substitute its judgment for that of the ALJ. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). Here, considering Dr. Ford's opinion and all of his qualifying remarks as a whole, as well as the remainder of the record, the ALJ's interpretation of the opinion evidence from Dr. Shigaki and Dr. Ford can be deemed rational. The ALJ provided specific and legitimate reasons for the rejection of Dr. Shigaki's opinions by pointing to contrary medical opinion evidence and evidence of plaintiff's inconsistent activities, *Tommasetti*, 533 F.3d at 1041, *Rollins*, 261 F.3d at 856, and her rational interpretation of the evidence should be upheld.

C. Dr. Geordie Knapp

The ALJ gave little weight to Dr. Knapp's opinions. (AR 23 and AR 606-18.) She gave little weight to an assigned GAF of 45 "because Dr. Knapp considered non-mental health issues in his rating, such as 'unemployed, inadequate finances, no health insurance.'" (AR 23 (quoting AR 608 and AR 615).) The ALJ also gave little weight to Dr. Knapp's opinions of severe limitations in plaintiff's ability to work with the public or tolerate the pressures and expectations of the workplace, and additional significant limitations, for a number of reasons: (1) inconsistency with the opinions of Dr. Ford; (2) inconsistency with plaintiff's demonstrated level of functioning and activities of daily living; (3) the impression the assessed limitations

were based on plaintiff's subjective reports, not objective examination findings; (4) inconsistency with the results of mini-mental status examinations conducted by Dr. Knapp; and (5) the observation that many of Dr. Knapp's 2010 findings "are word-for-word or nearly word-for-word copies of his 2009 assessment, suggesting that he simply copied his old findings into the more recent assessment[,]" making "his opinions less persuasive." (AR 23-24.)

Plaintiff first takes issue with the ALJ's rejection of the GAF score, pointing to Dr. Knapp's explanation for the basis of his rating as referring to, *inter alia*, plaintiff's reports of physical and sexual abuse by her father from childhood into her early teens, assessment of learning disorders in grade school, an abusive relationship lasting over twenty years, a first major depressive episode over twenty years ago following her son's death, a diagnosis with bipolar disorder eight years ago, her minimal job skills, and the inability "to be around others for sustained periods without getting verbally angry." (AR 608, 615.) Plaintiff argues "[t]his shows Dr. Knapp's GAF rating is based on factors related to [her] mental health impairments, contrary to the ALJ's conclusion." (Dkt. 12 at 21.) However, the ALJ did not assign little weight to the GAF score on this basis. She, instead, assigned it little weight given that it *also* included consideration of non-mental health issues, including unemployment, inadequate finances, and absence of health insurance. (AR 23 and AR 608, 615.) Plaintiff does not demonstrate error in the ALJ's reasoning. *See generally Vargas v. Lambert*, 159 F.3d 1161, 1164 n.2 (9th Cir. 1998) (GAF score is a "rough estimate" of an individual's psychological, social and occupational functioning, and is used to assess the need for treatment).

The ALJ also provided specific and legitimate reasons by pointing to the contrary opinion evidence from Dr. Ford, and the evidence of inconsistency with plaintiff's

demonstrated level of functioning and activities of daily living. *Tommasetti*, 533 F.3d at 1041, and *Rollins*, 261 F.3d at 856. Additionally, and as stated above, the ALJ properly rejected the opinions of Dr. Knapp, in part, as based on relying substantially on plaintiff's properly discredited subjective complaints, *Tommasetti*, 533 F.3d at 1041, and the internal inconsistency between the limitations assessed and the testing results, *Bayliss*, 427 F.3d at 1216. *See also Thomas*, 278 F.3d at 957 ("The ALJ need not accept the opinion of any physician, including a treating physician, if that opinion is brief, conclusory, and inadequately supported by clinical findings."); *Morgan*, 169 F.3d at 603 (ALJ appropriately considers internal inconsistencies within and between physicians' reports). While plaintiff notes the inclusion of Dr. Knapp's own observations of symptoms and behaviors, the ALJ's interpretation of this evidence is supported by a review of both reports. (*See* AR 606-18.)

Finally, the ALJ accurately and appropriately pointed to the marked similarity between the two evaluations. *See generally Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982) ("In reaching his findings, the law judge is entitled to draw inferences logically flowing from the evidence.") (cited sources omitted). Plaintiff fails to demonstrate error in this or in any other reasons proffered for the decision to accord little weight to the opinions of Dr. Knapp.

CONCLUSION

For the reasons set forth above, this matter should be AFFIRMED.

DATED this 8th day of October, 2013.

Mary Alice Theiler
Chief United States Magistrate Judge